

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of Section 304 of the	)	
Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
Commercial Availability of Navigation	)	
Devices	)	PP Docket No. 00-67
	)	
Compatibility Between Cable Systems and	)	
Consumer Electronics Equipment	)	
	)	

**PETITION FOR RULEMAKING**

July 16, 2013

## **SUMMARY**

TiVo Inc. (“TiVo”) petitions the Commission to conduct a rulemaking to reinstate its Second Report & Order (“Second R&O”) pertaining to Section 629 and the regulations enacted therewith, except for those provisions of the “Encoding Rules” that apply to Direct Broadcast Satellite (“DBS”) providers of MVPD programming and services.

A recent decision by the D.C. Circuit vacated the entire Second R&O, including a variety of technical standards applicable to cable operators that the Court did not analyze or suggest that the Commission lacked the authority to enact. These vacated rules include standards for encoding of signals and conditional access that cable operators and consumer electronics manufacturers agreed to a decade ago, and that cable operators, content providers, equipment manufacturers, and consumers have relied on for the past decade without controversy. By vacating these rules, the Court created an unhealthy amount of uncertainty in the industry — uncertainty that harms innovation and competition as well as settled consumer expectations.

The Commission can and should remove the uncertainty that threatens the video programming industry by reinstating the Second R&O as it pertains to cable operators. Nothing in the recent decision by the D.C. Circuit calls into question the Commission’s authority to enact the rules adopted in the Second R&O for cable operators; in fact, other court cases have consistently demonstrated the opposite and have affirmed the Commission’s authority under Section 629 to assure the competitive availability of retail navigation devices. Reinstating the Second R&O as requested in this Petition will not harm any party and will simply reinstate rules that have been in place for a decade and

have been relied upon by cable operators, content providers, device manufacturers, and consumers.

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**PETITION FOR RULEMAKING**

TiVo Inc. (“TiVo”) petitions the Commission pursuant to 47 C.F.R. Section 1.401 to initiate a rulemaking with respect to the Commission’s implementation of Section 629 of the Communications Act.<sup>1</sup> Specifically, TiVo petitions the Commission to conduct a rulemaking to reinstate its Second Report & Order (“Second R&O”)<sup>2</sup> pertaining to Section 629 and the regulations enacted therewith,<sup>3</sup> except for those provisions of the

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<sup>1</sup> Communications Act, Section 629, 47 U.S.C. § 549(a) (“Section 629”). Section 629 specifically directs to the Commission to assure in its regulations the commercial availability of navigation devices from manufacturers and vendors not affiliated with any Multichannel Video Programming Distributor.

<sup>2</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, FCC 03-225, Second Report and Order and Second Further Notice of Proposed Rulemaking (rel. Oct. 9, 2003) (“Second R&O”).

<sup>3</sup> Second R&O, App. B, at 42-50.

“Encoding Rules”<sup>4</sup> that apply to Direct Broadcast Satellite (“DBS”) providers of MVPD programming and services.<sup>5</sup>

As discussed below, the Court of Appeals for the D.C. Circuit recently vacated the rules enacted in the Second R&O after concluding that the Commission could not have imposed the Encoding Rules on DBS providers because they were not part of the deal negotiated by the cable and consumer electronics industries that formulated the substantive technical provisions contained in the Encoding Rules.<sup>6</sup> The Court decided that it could not sever the encoding rules applied to DBS providers from all of the other rules enacted in the Second R&O, and vacated the entire Order — even though nothing in the Court’s analysis questioned the Commission’s authority to enact the Encoding Rules for cable operators or the CableCARD standard.

By vacating the entire Second R&O, the Court created an unhealthy amount of uncertainty in the industry regarding the continued viability of standards relating to encoding and conditional access. The rules enacted in the Second R&O were in place for a decade and have been relied upon without controversy by cable operators, content providers, consumer electronics companies, and consumers. Indeed, the Commission recently strengthened the CableCARD rules in the Third Report and Order,<sup>7</sup> illustrating the continued importance of the rules enacted in the Second R&O and untouched by the *EchoStar* court’s analysis. As discussed in detail below, the Commission can and should

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<sup>4</sup> *Id.*, App. B, at 50-59, Subpart W- Encoding Rules, 47 C.F.R. §§ 76.1901-1908.

<sup>5</sup> The Commission’s application of Encoding Rules to DBS providers was invalidated by the Court of Appeals in *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013).

<sup>6</sup> *EchoStar*, 704 F.3d at 997-99.

<sup>7</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Third Report and Order and Order on Reconsideration, CS Dkt. No. 97-80, PP Dkt. No. 00-67, FCC 10-181 (rel. Oct. 14, 2010) (“Third R&O”).

remove the uncertainty that threatens the industry by reinstating the Second R&O as it pertains to cable operators.

Founded in 1997, TiVo, a pioneer in home entertainment, created the world's first digital video recorder (DVR) and continues to revolutionize the way consumers watch and access home entertainment, by making the TiVo DVR the focal point of the digital living room: a center for sharing and experiencing television, movies, video downloads, music, photos, and more. TiVo users utilize CableCARDS to access signals from cable operators. TiVo has participated in the above-captioned proceeding and has long sought to strengthen the Commission's enforcement of its CableCARD rules. Thus, TiVo's interests will be affected directly by the reinstatement of the rules sought in this Petition.

## **BACKGROUND AND INTRODUCTION**

Congress enacted Section 629 as Section 304 of the Telecommunications Act of 1996.<sup>8</sup> The legislation specifically instructed the Commission, in its regulations, to *assure the commercial availability* of navigation devices from manufacturers and retail vendors not affiliated with an MVPD programming provider.

### **First R&O**

In 1998 the Commission released its First Report & Order ("First R&O") to implement Section 629.<sup>9</sup> The First R&O explicitly required MVPDs other than DBS operators<sup>10</sup> to support retail devices by providing customers with standard interface,

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<sup>8</sup> 47 U.S.C. §549, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat 56.

<sup>9</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, FCC 98-116, Report and Order (rel. June 24, 1998) ("First R&O").

<sup>10</sup> The First R&O granted forbearance to DBS operators on the basis of their national service footprint and their licensing, at that time, of retail entrants who had successfully entered and maintained their positions in the commercial marketplace.

separable security modules initially called “Point of Deployment” modules (“PODs”), later renamed by CableLabs as CableCARDS™ (hereinafter, “CableCARDS”).<sup>11</sup> This obligation was specifically reiterated in the 1999 Order on Reconsideration.<sup>12</sup>

In the First R&O, the Commission enacted rules codified at 47 C.F.R. §§ 76.1200–1210. The First R&O required cable Multi-System Operators (“MSOs”) to begin supplying PODs to their subscribers by July 1, 2000, and to rely on PODs in their own leased devices by January 1, 2005.<sup>13</sup>

### **Year 2000 Declaratory Ruling and Further Notice**

No CableCARD-reliant retail devices had reached the market by July 1, 2000, the date that MSOs were required to begin supplying PODs. Consumer electronics retailers claimed that this was due to CableLabs licensing and technical requirements, particularly those with respect to copy protection technologies. Retailers claimed the license offered on behalf of MSOs by CableLabs violated Sections 76.1201, 76.1203, and 76.1205 by imposing copy protection restraints beyond those necessary to guard against technical

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<sup>11</sup> “The early cable removable security cards were called Point-of-Deployment (POD) modules. CableLabs later coined the term CableCARD™ .... These are two names for the same thing.” CableLabs, OpenCable CableCARD, [http://www.cablelabs.com/opencable/primer/cablecard\\_primer.html](http://www.cablelabs.com/opencable/primer/cablecard_primer.html); see also *Second R&O*, ¶19 n.45 (“According to NCTA, PODs will now be referred to as CableCARDS for marketing purposes.”).

<sup>12</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Order on Reconsideration, CS Dkt. No. 97-80, FCC 99-95, ¶ 4 (rel. May 14, 1999).

<sup>13</sup> The July 1, 2005 date was the date for implementing the “integration ban” or “common reliance.” Upon cable industry petition, the date was twice moved back by the FCC, ultimately to July 1, 2007. The integration ban remains in place even after being challenged unsuccessfully on three occasions. See, *Gen. Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000); *Charter Commc’ns v. FCC*, 440 F.3d 31 (D.C. Cir. 2006); *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008).

“electronic or physical harm” to the network or “unauthorized receipt of service.”<sup>14</sup> In response to these complaints and to public comment, the Commission on Sept. 18, 2000, released a Declaratory Ruling and Further Notice of Proposed Rulemaking (“Further Notice”).<sup>15</sup> The Declaratory Ruling portion of the Further Notice established general guidelines<sup>16</sup> interpreting the degree to which a CableLabs license technology mandate in aid only of copy protection would be construed as preventing “unauthorized receipt of service” and thus permissible under Section 76.1203. Further, the FCC said that any prospective retail entrant obliged to sign a license that it believes exceeds these guidelines may petition the Commission for relief.<sup>17</sup> The Further Notice portion asked for public comment on why competitive entry had not occurred, and what further steps might be taken by the FCC to assure the development of a commercial market for retail navigation devices. It required cable operators to report on the status of the DFAST license negotiations and to submit a complete, “final version” of the DFAST license within 30 days of the Further Notice’s release.<sup>18</sup>

## **Second R&O**

In Comments submitted in response to the Further Notice, prospective entrants pointed to myriad frustrations attributable to cable operators and CableLabs.<sup>19</sup> MSOs

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<sup>14</sup> 47 C.F.R. § 76.1203.

<sup>15</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Further Notice of Proposed Rule Making and Declaratory Ruling, CS Dkt. No. 97-80, FCC 00-341 (rel. Sept. 18, 2000) (“Further Notice”).

<sup>16</sup> *Id.* ¶¶ 25-29.

<sup>17</sup> *Id.* ¶ 29 & n.71.

<sup>18</sup> *Id.* ¶ 32.

<sup>19</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Comments of CERC (Nov. 15, 2000); Comments of the CEA (Nov. 15, 2000); *see also Implementation of Section 304 of*

and their suppliers claimed they had supplied adequate means to support entry but that manufacturers and retailers were not genuinely interested in entering the market.<sup>20</sup>

Congressional leaders<sup>21</sup> and the Commission's Media Bureau<sup>22</sup> convened joint meetings at which they demanded explanations from each side, and urged the two sides to work out a more specific framework for standards, licensing, and technical support. The parties' joint meetings resulted in a 2002 "Memorandum of Understanding"<sup>23</sup> on a draft model

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*the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, CERC Reply to the NCTA Letter as to "Retail Set-Top Initiative" and to the NCTA Response to CERC Status Report "J2K Plus 1" (Nov. 6, 2001); Letter from Robert S. Schwartz, Counsel, CERC, to Marlene H. Dortch, Sec., FCC, re: *Ex Parte* Presentation (Aug. 1, 2002) (CERC Reply to NCTA Attempt to Further Escape Commission Deadlines and Expectations for Competition and Interoperability.).

<sup>20</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Comments of Scientific-Atlanta in Response to Further Notice of Proposed Rulemaking (Nov. 14, 2000); Comments of Motorola, Inc. (Nov. 15, 2000).

<sup>21</sup> *Ensuring Content Protection in the Digital Age: Hearing Before the H. Comm. on Energy and Commerce, Subcomm. on Telecommunications and the Internet*, 107<sup>th</sup> Cong. 1-2, 5-6, 9, 86 (2002) (statements of Reps. Upton, Tauzin and Stearns), <http://www.gpo.gov/fdsys/pkg/CHRG-107hhrg79464/pdf/CHRG-107hhrg79464.pdf>.

<sup>22</sup> Memo from Thomas L. Horan, Sr. Legal Advisor, Media Bureau to Marlene H. Dortch, Sec., FCC, re: *Ex Parte* Meeting in PP Dkt. No. 97-80 (sic) (May 13, 2002); Consumer Electronics Retailers Coalition, Answer Of The Consumer Electronics Retailers Coalition To Hoedown Questions Re Cable Industry's Draft 'POD Host-Interface License Agreement' ('PHILA'), C.S. Docket No. 97-80 ( June 6, 2002).

<sup>23</sup> Letter from Carl E. Vogel, President and CEO, Charter Communications, et al , to Michael K. Powell, Chairman, FCC (Dec. 19,2002) ("Cable/CE Letter"), *Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers* (signed by Charter Communications, Inc., Comcast Cable Communications, Inc , Cox Communications, Inc., Time Warner Cable, CSC Holdings, Inc., Insight Communications Company, L.P., Cable One, Inc., Advance/Newhouse Communications, Hitachi America, Ltd., JVC Americas Corp , Mitsubishi Digital Electronics America, Inc , Matsushita Electric Corp. of America (Panasonic), Philips Consumer Electronics North America, Pioneer North America, Inc., Runco International, Inc , Samsung Electronics Corporation, Sharp Electronics Corporation, Sony Electronics, Inc , Thomson, Toshiba America Consumer Electronics, Inc., Yamaha Electronics Corporation, USA, and Zenith Electronics Corporation) ("MOU").

“DFAST” license agreement<sup>24</sup> and a set of jointly recommended regulations that the parties considered integral to their ability to implement the license agreement. The draft regulations and (for reference only) the model DFAST license were presented to Chairman Powell via a joint letter<sup>25</sup> filed with the Commission on December 22, 2002. After public notice and comment, the Commission released the Second R&O, which included regulations based substantially on the parties’ recommendations. Commercial competitive entry followed.

A key element of the parties’ negotiations entailed resolution of the copy protection issue that had previously been brought to the FCC, and over which the Commission had accepted oversight pursuant to implementing Section 76.1203 of its rules. The parties recommended a framework that would balance the interests of the system operators, programmers, and the commercial device vendors: the DFAST license would require CableCARD-reliant products to recognize copy protection codes or commands, including those that could cut off the flow of content to an output or could prevent or limit in-home movement to or copying by other devices. However, to assure that commercial products would function nationally as advertised to consumers, and not be restricted in their function from system to system, the system operators and programmers would be subject to “Encoding Rules” that define and limit the circumstances in which copy protection may be triggered. These were the Encoding Rules adopted as part of the Second R&O.

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<sup>24</sup> A draft of the DFAST license was filed along with the Joint letter from CE and cable interested parties. *See* note 25, *infra*.

<sup>25</sup> Letter to Hon. Michael K. Powell, Chairman, FCC from 14 digital television manufacturers and eight cable multisystem operators, re: Consensus Cable MSO-Consumer Electronics Industry Agreement on “Plug & Play” Cable Compatibility and Related Issues, and attachments, CS Dkt. No. 97-80, PP Dkt. 00-67 (Dec. 19, 2002).

The Encoding Rules concept utilized in the Second R&O was not invented by these CE and cable parties; it was a development of a provision enacted in the Digital Millennium Copyright Act of 1998 (“DMCA”).<sup>26</sup> The DMCA required analog videocassette recorders to respond to particular coding that content providers might apply to transmissions or prerecorded tapes. To protect consumers’ customary expectations, Section 1201(k) limited the circumstances in which such encoding could be applied. The CE-Cable Encoding Rules generally follow the DMCA guidelines.

Since some of their recommended framework was to be in private license and some in official regulation, the parties reserved the right to reconsider their commitments to each other in the event that the FCC might revise significant elements of the recommended framework. One element deemed important in 2002 – 2003 was that (since Section 629 applies to all MVPD system operators) the Encoding Rules cover DBS as well as cable operators. When the Commission sought public comment<sup>27</sup> DBS operators opposed this outcome.<sup>28</sup> DISH Networks (then “EchoStar”) appealed to the D.C. Circuit, but the appeal was stayed for a decade, until the challenge finally was heard by the Court.

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<sup>26</sup> 17 U.S.C. 1201 *et seq.* These provisions in turn grew out of recommendations developed in years of negotiations between the consumer electronics and motion picture industries. See *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Comments of the Home Recording Rights Coalition In Response To Further Notice of Proposed Rulemaking, at 3-5 (Mar. 28, 2003) (“HRRC Response”).

<sup>27</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Further Notice of Proposed Rulemaking, CS Dkt. No. 97-80, PP Dkt. No. 00-67, FCC 03-3 (rel. Jan. 10, 2003).

<sup>28</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Comments of DIRECTV, Inc. (Mar. 28, 2003); Comments of SBCA (Mar. 28, 2003); Consumer Electronics Industry Reply Comments (Apr. 28, 2003).

The Second R&O addressed far more than Encoding Rules. It set forth a very specific technical framework of standards references that the parties agreed upon as describing a stable and nationally interoperable interface for commercial reliance on CableCARDS. The parties have now relied on these referenced standards without controversy for a decade. While there have been complaints about CableLabs and operator implementation,<sup>29</sup> the standards references have provided exactly the sort of the stable national platform for competition that the parties had envisaged. Indeed, in the last months, significant new CableCARD-reliant entry of commercial products has been announced.<sup>30</sup> These Commission regulations, however, and *all* of the Encoding Rules have now been voided by the Court of Appeals in the *EchoStar* case, based solely on the Court's finding that Encoding Rules were improperly imposed on DBS operators in 2003.<sup>31</sup>

### ***EchoStar* Case**

Pending petitions for reconsideration of the Second R&O stayed the *EchoStar* appeal until it emerged, as if from a time warp, for a ruling in 2013 – a decade after the Second R&O's release. The Court in *EchoStar* held that for the FCC to have covered DBS operators in Encoding Rules as a “*quid pro quo*” of a CE–Cable agreement was

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<sup>29</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Fourth Further Notice of Proposed Rulemaking ¶¶ 3, 9, 16, 18 (rel. Apr. 21, 2010).

<sup>30</sup> Mari Silbey, *Samsung Embraces CableCARDS*, Light Reading, May 28, 2013, <http://www.lightreading.com/dvrs/samsung-embraces-cablecards/240155638>; Mari Silbey, *Ceton Boosts CableCARDS*, Light Reading, May 14, 2013, <http://www.lightreading.com/content-protection/cton-boosts-cablecards/240154837>.

<sup>31</sup> As mentioned earlier, the Commission released a Third R&O in 2010, which strengthened cable operator obligations to provide and support CableCARDS, and which updated a home networking interface requirement adopted in the Second R&O.

arbitrary and beyond FCC authority.<sup>32</sup> According to the Court, the FCC in defense pointed out that the parties had pledged to proceed with the private undertaking parts of the framework only if the regulatory elements were accepted by the FCC. Thus, the Encoding Rules were (at the time of the recommendation) seen by the Court as being “integral” to the R&O framework, making their inclusion was reasonable and necessary.<sup>33</sup> Based on this assertion, the Court found the Encoding Rules not to be severable from the other regulations then enacted and vacated the entire Second R&O. The Court did *not*, however, make any findings adverse to any of the other regulations enacted with the Second R&O, to the CableCARD regulations in general, *or* to the Encoding Rules themselves as they pertain to cable operators.<sup>34</sup> Hence, there is nothing in *EchoStar* to impede the Commission from re-instating the non-controversial standards-reference regulations adopted with the Second R&O, and from re-instating the Encoding Rules, *sans* the language that included DBS operators in their scope. This is the relief that TiVo seeks in this Petition.

**I. THE ENCODING RULES REMAIN IMPORTANT TO COMPETITIVE AVAILABILITY AND RETAIL COMPETITION AS REQUIRED BY SECTION 629 OF THE COMMUNICATIONS ACT.**

The Encoding Rules emerged as a way to assure that consumers who contemplate purchasing a competitive product may be confident that, when connected to any cable system, the product will work as described by the manufacturer and retailer. Without this assurance, any programmer or cable MSO could include triggers to limit or prevent

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<sup>32</sup> *EchoStar*, 704 F.3d at 998-99.

<sup>33</sup> *Id.* at 1000.

<sup>34</sup> This point was underscored in the concurring opinion of Judge Edwards. *EchoStar*, 704 F.3d at 1001-02.

recording or to restrict the viewing of content on consumer devices in contravention of well-settled consumer expectations. Without the Encoding Rules rules in place, consumer reliance on commercially competitive devices, which the FCC is charged by Section 629 with *assuring*, can be compromised at any time. The goals of the Encoding Rules remain as important today as they were when the rules were enacted in the Second R&O.

**A. The Encoding Rules Assure That Free Over-Air Broadcasts Can Be Stored And Shared Within A Home On Retail Devices.**

The DFAST license Compliance Rules require licensed products to respond to copy protection and output control triggers. Yet since the Supreme Court's 1984 decision in the *Sony Betamax* case,<sup>35</sup> the right of consumers to make personal recordings of free, over the air content has been generally accepted. Congress protected this expectation, in the analog context, in Section 1201(k) of the DMCA (17 U.S.C. 1201(k)), which, in requiring VCRs to respond to copy protection codes, sets limits on when these codes can be inserted into programming. In similar fashion, Section 76.1904(a) of the Encoding Rules provides:

- (a) Commercial audiovisual content delivered as unencrypted broadcast television shall not be encoded so as to prevent or limit copying thereof by covered products or, to constrain the resolution of the image when output from a covered product.

Section 76.1904(a) is necessary to assure consumers who would purchase a retail CableCARD-reliant product that its use will not be curtailed by unreasonable insertion of codes to limit personal recording and viewing.

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<sup>35</sup> *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

**B. The Encoding Rules Assure That A Device Other Than One Supplied By The Operator Can Make And Retain A Home Recording Of Subscription Programming.**

Private sector standards agreements have also followed Congress's lead in building in reasonable limitations on when consumers' personal enjoyment of licensed products can be limited through copy protection or output control encoding.<sup>36</sup>

Subsections 76.1904 (b)(1) and (b)(2) draw on private sector precedent to assure that purchasers of retail devices can fully exercise their rights to personal viewing and recording:

(b) Except for a specific determination made by the Commission pursuant to a petition \*\*\* :

(1) Commercial audiovisual content shall not be encoded so as to prevent or limit copying thereof except as follows:

(i) To prevent or limit copying of video-on-demand or pay-per-view transmissions, subject to the requirements of paragraph (b)(2) of this section; and

(ii) To prevent or limit copying, other than first generation of copies, of pay television transmissions, non-premium subscription television, and free conditional access delivery transmissions; and

(2) With respect to any commercial audiovisual content delivered or transmitted in form of a video-on-demand or pay-per-view transmission, a covered entity shall not encode such content so as to prevent a covered product, without further authorization, from pausing such content up to 90 minutes from initial transmission by the covered entity (e.g., frame-by-frame, minute-by-minute, megabyte by megabyte).

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<sup>36</sup> See, WIPO, Workshop on Implementation Issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), Dean S. Marks, Bruce H. Turnbull, *Technical Protection Measures: The Intersection of Technology, Law and Commercial Licenses*, at 10-20 (Dec. 6-7, 1999), [http://www.wipo.int/edocs/mdocs/copyright/en/wct\\_wppt\\_imp/wct\\_wppt\\_imp\\_3.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/wct_wppt_imp/wct_wppt_imp_3.pdf).

This provision assures that programmers or operators will not interfere with recording on licensed devices, but allows the programmer or operator to prevent copying of the copies. For programming received “on demand,” the programmer or operator may prevent the retention of *any* copies so long as the content may be “paused” for up to 90 minutes to accommodate interruptions to the paid viewing session. This has now been customary practice for a decade and should not be subject to arbitrary interruption. The Encoding Rules are also necessary to assure that a programmer or operator does not interrupt the use of retail devices while allowing the same use, of the same programming, on leased devices.

**C. The Encoding Rules Protect The Ability Of Consumers To View Programming On Displays They Have Lawfully Purchased.**

Section 76.1903 of the Encoding Rules provides:

A covered entity shall not attach or embed data or information with commercial audiovisual content, or otherwise apply to, associate with, or allow such data to persist in or remain associated with such content, so as to prevent its output through any analog or digital output authorized or permitted under license, law or regulation governing such covered product.

This rule limiting “Selectable Output Control” protects TVs and other home network products owned by the consumer from going dark through “selectable output control.” Without this rule, a programmer or operator, based on entirely arbitrary or device-specific competitive considerations, could choose to support products with favored interfaces and not support others.<sup>37</sup> As noted by the Court of Appeals, the

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<sup>37</sup> See, HRRC Response; *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, HRRC Opposition to Petitions for Reconsideration (Mar. 10, 2004); Reply Comments of HRRC (Mar. 15, 2004); Comments of Public Knowledge, *et. al.* (Aug. 24, 2007); Reply Comments of the HRRC (Sept. 10, 2007); *In the Matter of Motion Picture*

Commission has made some exceptions to this rule by waiver, if public notice and opportunity for comment are provided.<sup>38</sup> However, this rule remains a core protector of the integrity of consumer purchases that rely on the capabilities of navigation devices.

**D. The Encoding Rules Protect And Facilitate The Use Of Retail Devices In Home Gateways.**

Without the protection of Encoding Rules, an operator could support only those home network devices that it favors or distributes. The Commission moved to *avoid* such outcomes when, in its Third R&O, it amended Section 76.640 to require a standards-based, IP-level output to home networks. By acting on TiVo's petition the Commission would remove any doubt as to the status of its amendment to Section 76.640, which modified a provision adopted with the Second R&O. Such a clarification, however, could be worthless if the Encoding Rules themselves were not reinstated. An MSO would then retain the power to shut off the entire home network interface entirely – whether or not it is standards-based and complies with Section 76.640. Section 76.1903 must be reinstated to guard against this.

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*Association of America, Inc. Petition for Waiver of 47 C.F.R. § 76.1903*, CS Dkt. No. 97-80, MB Dkt. No. 08-82, CSR-7947-Z, Opposition of the CEA to the MPAA Petition for Waiver of 47 C.F.R. § 76.1903 (July 21, 2008); Opposition of the HRRC to the MPAA Petition for Waiver of 47 C.F.R. § 76.1903 (July 21, 2008).

<sup>38</sup> *EchoStar*, 704 F.3d at 997-998; see *Motion Picture Association of America Petition for Expedited Special Relief; Petition for Waiver of the Commission's Prohibition on the Use of Selectable Output Control (47 C.F. R. § 76.1903)*, Memorandum Opinion and Order, MB Dkt. No. 08-82, CSR-7947-Z, DA 10-795, ¶¶ 12-18 (rel. May 7, 2010).

**II. THE *ECHOSTAR* COURT DID NOT QUESTION THE COMMISSION’S AUTHORITY TO ADOPT THE ENCODING RULES OR OTHER ELEMENTS OF THE SECOND R&O AS THEY PERTAIN TO CABLE PROGRAMMING. THESE CAN AND SHOULD BE REINSTATED.**

There is nothing in the *EchoStar* opinion or case that should prevent or even discourage the Commission from re-enacting the rules adopted with the Second R&O as they pertain to the cable entities who recommended them.

**A. The Court In *EchoStar* Addressed Only The Application Of The Encoding Rules To DBS Providers.**

Dish Networks and *EchoStar*, in bringing and pursuing their court case, had no interest in or concern with the technical rules of Section 76.640, or with the Encoding Rules as they pertain and apply to cable operators. No controversy over these provisions was before the Court, and the Court made clear that it was not addressing *any* element of the Second R&O that applied only to cable systems, cable operators, and cable devices.<sup>39</sup>

The only reason given by the Court for vacating the remainder of the Second R&O was an assertion by FCC counsel based on circumstances at the time the Cable/CE petition was submitted to the Commission, more than a decade ago. Counsel for the FCC stated that in submitting their letter to Chairman Powell the parties reserved the right not to go forward with the private elements of their framework agreement (*i.e.*, the DFAST license) if the Commission were to modify the regulatory element of the recommended framework. Since the technical standards elements of the Second R&O (Sections 76.640 and 15.123) are non-controversial and were not addressed by either the plaintiff or the Court in *EchoStar*, the only question raised by *EchoStar* should pertain to the Encoding Rules: Today, is coverage of DBS “integral” to the Encoding Rules, or can they be

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<sup>39</sup> *EchoStar*, 704 F.3d at 1001-02.

maintained only as they apply to the cable entities that recommended them? TiVo has demonstrated above that they should and must be retained to assure the commercial availability of retail navigation devices. As we discuss below, the Commission can do so without disturbing any other element of its regulations or of private sector conduct based on its regulations.

**B. Considerations In 2002 About The Integral Nature of DBS Encoding Rules Are Not Relevant Today And Cannot Reasonably Bar Reinstatement Of The Remainder Of The Second R&O.**

The factors that impelled the parties to the Cable/CE letter to regard coverage of DBS by the Encoding Rules as integral to their agreement reflected conditions and concerns as of the time of their joint recommendation. These factors no longer persist.

The standards references in Section 76.640 pertain strictly to cable operation and thus are of only the most indirect, tertiary relevance to DBS.<sup>40</sup> Manufacturers *did* enter into the DFAST license. The technical standards referenced in Section 76.640 and the nomenclature guidelines added in Section 15.123 *have now been in effect for a decade* and *no longer depend* in any way on any DBS service consideration. To remove them now would be senseless and harm settled consumer and market expectations as well as the market for retail navigation devices.

While the Encoding Rules do retain some materiality to 2002–03 concerns about whether to offer or *sign* the DFAST license, these are now so attenuated that they should not bar the Encoding Rules from reinstatement. Neither cable nor CE interests are threatening to disclaim the terms of the DFAST license. However, the DFAST license

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<sup>40</sup> The standards references and labeling requirements are complementary to the DFAST license. CE manufacturers would not have agreed to DFAST without Encoding Rules. Cable operators would not have accepted Encoding Rules unless they also covered DBS.

required licensees to observe the CCI copy protection flags. The Encoding Rules govern to which content those CCI bits may be applied. The primary concern, then, is whether content providers or programmers would now reduce consumer flexibility over how they can view their lawfully acquired broadcast and cable content by applying copy protection flags more restrictively than allowed by the Encoding Rules which have shaped consumer expectations over the past decade. Since cable MSOs don't need to sign the DFAST Agreement, an additional concern is whether cable MSOs would now discriminate against retail devices in their use of copy protection triggers. These concerns are unrelated to the decade-old statements to the FCC over the circumstance under which parties would go forward with the DFAST license.

The solution here is simple. To maintain the Second R&O yet satisfy the *EchoStar* decision it is necessary only to revise the wording of Section 76.1901 to refer simply to "Each cable system operator ...." A draft amendment so providing is attached as Appendix A.

**III. THE SECOND REPORT & ORDER CAN BE REINSTATED AS IT PERTAINS TO CABLE PROGRAMMING AND SERVICES WITHOUT ANY ADVERSE EFFECT ON CONTENT PROVIDERS, DBS OR CABLE OPERATORS, OR CONSUMERS.**

It would benefit the public and competition for the Commission to reinstate the Second R&O, with the single amendment described above. This would benefit competition and consumers, while not harming any interested parties as it restores the regulatory framework that was in place before the *EchoStar* decision for cable operators, equipment manufacturers, content providers, and consumers.

**A. Content Providers, Cable Operators, Equipment Manufacturers, and Consumers Have Not Been Adversely Affected By Encoding Rules That Have Been in Place for A Decade and No Parties Will Be Hurt By The Reinstatement of the Encoding Rules.**

Reinstating the Encoding Rules will simply assure that retail manufacturers, programmers, and cable operators continue to operate in accordance with the bargain they made a decade ago, and that has worked well for all parties involved. The balance struck by the Encoding Rule model has proved beneficial in satisfying consumers while, through the Compliance and Robustness rules of the DFAST license, assuring that licensed home devices have been minimized as potential sources for piracy.<sup>41</sup> The piracy concerns of content industries thus have been focused elsewhere.

Content providers would not be able to point to any significant harm experienced from the customary practices that (as noted above) they have supported in private sector standards licenses. The viability of retail products, however, relies on consistency in practice. For the content protected by the Encoding Rules, it is important that:

- (a) Consumer expectations remain uniform, rather than varying from program to program at the whim of a programmer, and
- (b) Retail devices continue to work comparably to leased devices.

Meanwhile, consumers have relied on the operation of Encoding Rules for a decade and have benefitted from such rules by being able to enjoy greater flexibility in how they view programs within their homes. In fact, since 2003, consumer viewing habits have changed significantly as more consumers enjoy the greater flexibility in when and where within the home they view programming — a direct result of the balance

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<sup>41</sup> To the extent content providers have had any concerns about earliest window content, the Commission has addressed these by waiver.

struck over a decade ago that enabled such flexibility while addressing programming content providers' and cable operators' concerns.

By reinstating the Encoding Rules as they pertain to cable-licensed products, the Commission would assure this without inflicting any harm on content providers. As noted above, the encoding rules have been in place from 2003 until the recent *EchoStar* decision, and content providers have not been harmed by the balance of copy protection and facilitating shifting consumer viewing habits struck by the rules.

**B. Reinstatement Of The Rules Referencing Technical Standards Should Be Noncontroversial And Will Alleviate Concerns Expressed By The Bureau And Others That CableCARDs May Become Less Reliable As A Standard Platform.**

The *EchoStar* opinion caused the Media Bureau to express concern and raise questions over the future stability of the CableCARD regime and platform in the wake of *EchoStar*.<sup>42</sup> While TiVo<sup>43</sup> and others<sup>44</sup> have criticized the Bureau for making this observation without record support or public comment, it would be beneficial for the Commission to reinstate Sections 76.640 and 15.123, which provide the standards-based underpinnings for a stable CableCARD regime.

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<sup>42</sup> *Charter Communications, Inc.'s Request for Waiver of 47 C.F.R. § 76.1204(a)(1) of the Commission's Rules*, Memorandum Opinion and Order, MB Dkt. No. 12-238, CSR-8740-Z, CS Dkt. No. 97-80, DA 13-788, ¶ 9 (rel. Apr. 18, 2013) ("Charter Waiver").

<sup>43</sup> *In the Matter of Charter Communications, Inc.'s Request for Waiver of 47 C.F.R. § 76.1204(a)(1) of the Commission's Rules*, MB Dkt. No. 12-238, CSR-8740-Z, CS Dkt. No. 97-80, Petition for Reconsideration of TiVo Inc., at 12-13 (May 20, 2013) ("TiVo Petition for Reconsideration").

<sup>44</sup> CEA referred to this observation as "gratuitous." *In the Matter of Charter Communications, Inc.'s Request for Waiver of 47 C.F.R. § 76.1204(a)(1) of the Commission's Rules*, MB Dkt. No. 12-238, CSR-8740-Z, CS Dkt. No. 97-80, Application for Review, at 9-10 (May 20, 2013) ("CEA Application for Review").

The uncertainty caused by *EchoStar* is epitomized by the record in the Charter Waiver. The Media Bureau's Order speculated about, but did not purport to resolve, the status of earlier and later rules in the wake of *EchoStar*'s rejection of only the Second R&O.<sup>45</sup> Based on this speculation, Charter formulated arguments – rejected by TiVo in its Petition for Reconsideration<sup>46</sup> and by the CEA in its Application for Review<sup>47</sup> – suggesting that *every* FCC rule pertaining to CableCARDs and common reliance was now subject to reinterpretation and dismissal, even though the Court in *EchoStar* was at pains to say that, with respect to cable services, and even with respect to the FCC's *jurisdiction* over DBS, it meant no such thing. Given Section 629's requirement that the Commission assure the competitive availability of retail navigation devices, it is the Commission's statutory responsibility to resolve any uncertainty or ambiguity concerning its rules. This uncertainty and drift will be amplified until the Commission reinstates these rules.

As the Commission recognized in the Third R&O, CableCARD is the only realized technology available today that serves as a national standard that manufacturers can build to.<sup>48</sup> By reinstating the CableCARD rules, the Commission would provide

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<sup>45</sup> “We recognize that, in vacating the *Second Report and Order*, the *EchoStar* decision eliminated the requirement that cable operators continue to support CableCARD as a means of complying with the integration ban... After the *EchoStar* decision, we recognize that there is the potential for a fractured cable set-top box market should different cable operators adopt differing non-CableCARD separated-security standards.” Charter Waiver, ¶9.

<sup>46</sup> *In the Matter of Charter Communications, Inc.’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1) of the Commission’s Rules*, MB Dkt. No. 12-238, CSR-8740-Z, CS Dkt. No. 97-80, TiVo Inc. Reply to Opposition, at 2-6 (May 20, 2013) (“TiVo Reply”).

<sup>47</sup> *In the Matter of Charter Communications, Inc.’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1) of the Commission’s Rules*, MB Dkt. No. 12-238, CSR-8740-Z, CS Dkt. No. 97-80, CEA Reply, at 2-3 (June 13, 2013).

<sup>48</sup> Third R&O, ¶ 8.

much-needed clarity and certainty to manufacturers, cable operators, and consumers regarding the continued applicability of the CableCARD standard. By reinstating the Second R&O, the Commission also would be providing clear guidance to the Media and Enforcement Bureaus about which conduct – still subject to requirements of the First and Third R&O CableCARD provisions – should be judged noncompliant.

**IV. THE COMMISSION’S IMPLEMENTATION OF SECTION 629 WILL BE INCOMPLETE IF THE ENCODING RULES AND THE OTHER PROVISIONS OF THE SECOND REPORT & ORDER ARE NOT REINSTATED.**

If the Commission does not reinstate the cable provisions of the Second R&O, it will no longer be “assuring” commercial availability of retail devices *in its regulations*. It will, rather, have left a void in its regulations, to be filled by Bureau-level interpretations and reactions to complaints. This will provide neither stability nor assurance. By reinstating the Second R&O, the Commission would remove all doubt about the continued applicability of the one fully-realized conditional access technology that exists today — a single, national, portable solution that the Commission has consistently seen as vital to fulfilling the goals of Section 629.<sup>49</sup>

As an independent seller of CableCARD-reliant products TiVo is already subject to too many impositions not put on operator-leased devices.<sup>50</sup> If the Commission takes

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<sup>49</sup> See, e.g., *First R&O* ¶ 70 (“What is important is for the [POD] supplied by the service provider to be designed to connect to and function with other navigation devices through the use of a *commonly* used interface or through an interface that conforms to appropriate technical standards promulgated by a *national* standards organization.”) (emphasis added); *id.* ¶49 (discussing the importance of a conditional access security solution that permits portability of equipment).

<sup>50</sup> TiVo owners must endure CableCARD installation pairing issues which operator-provided boxes do not endure since operator-provided boxes can be paired by the operator before arriving at a customer’s home. TiVo owners must also deal with an add-on set-top device in systems that employ “switched digital” techniques, and by terms of

no action on this Petition, consumers considering the purchase of TiVo products or those of more recent commercial entrants will be faced with additional and crucial uncertainty about whether these devices will be supported by cable operators and, if so, whether they will function as advertised.<sup>51</sup> To subject independent, CableCARD-reliant products to further potential disabilities compared to leased devices would be to move in the opposite direction from the FCC's obligation to assure the vitality of a commercial market for independently sourced products. This comes at a time when retail CableCARD devices grew by 8 percent in 2012, and CableCARD-equipped set-top boxes grew by 22 percent.<sup>52</sup> This would also come at a time when in addition to TiVo devices, consumers are seeing greater choice from new CableCARD devices from Samsung and Ceton Corp.<sup>53</sup>

It is important to note also that CableCARD rules benefit not only retail device manufacturers, but also small and mid-sized cable operators. Only the largest cable operators find it cost-effective to use unique or proprietary conditional access systems, but the CableCARD standard enables a variety of set-top box manufacturers to supply low-cost boxes to small and mid-size cable operators thanks to the economies of scale that a single, nationwide standard allow. In the past, smaller cable operators were typically locked in to a single supplier of conditional access systems, from among two choices — Cisco and Motorola. Thanks to CableCARD, these smaller operators can

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the DFAST license cannot request cable programming, such as video-on-demand through upstream communication.

<sup>51</sup> See Charter Waiver, ¶9.

<sup>52</sup> As *Home Theater* magazine noted, “CableCARDS (without a set-top box attached) grew by 8 percent in 2012, with card-equipped boxes up 22 percent. That looks pretty healthy for a technology that cable operators are trying to kill via FCC waivers.” *Home Theater*, Vol.20, No. 5, at 17 (June 2013).

<sup>53</sup> See footnote 30, *supra*.

purchase set-top boxes from Pace, Arris, Samsung, and TiVo in addition to Cisco and Motorola. The CableCARD standard has worked as envisioned — a single standard leads to economies of scale, which in turns leads to lower costs for cable operators and consumers, while allowing small and mid-sized cable operators to offer their subscribers higher-quality services.<sup>54</sup> This benefit would be lost without an agreed-to CableCARD standard, making it all the more important for the Commission to provide certainty in this area.

**V. REINSTATING THE SECOND REPORT & ORDER AND THE ASSOCIATED REGULATIONS IS NOT INCONSISTENT WITH THE NEED FOR A SUCCESSOR TO CABLECARD.**

Reinstatement of the Second Report & Order and the associated FCC regulations is necessary to restore the status quo before the *EchoStar* decision so that manufacturers and consumers can have assurance that current retail products will be supported and will work as advertised. However, TiVo is not intending to suggest that the Commission should in any way stop focusing on a viable successor to CableCARD.

CableCARD is a more than decade-old technology and far more modern and elegant security solutions are feasible. TiVo has long supported the idea of alternative

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<sup>54</sup> The national CableCARD standard has allowed small and medium size cable operators such as Mediacom, RCN, Suddenlink, GCI, Midcontinent, and Atlantic Broadband to offer the TiVo box to their subscribers as the cable-provided set-top box, thereby providing their customers with a higher quality service and greater functionality than a typical cable set-top box. *See, e.g.*, GCI Launches TiVo Offering, Mar. 21, 2013, at <http://pr.tivo.com/press-releases/gci-launches-tivo-offering-nasdaq-tivo-999103>; Midcontinent Launches TiVo as Exclusive Next-Generation Advanced TV Offering, Apr. 4, 2013, at <http://pr.tivo.com/press-releases/midcontinent-launches-tivo-as-exclusive-next-gener-nasdaq-tivo-1003630>; TiVo Rolling Out to Mediacom Customers, June 11, 2013, at <http://pr.tivo.com/press-releases/tivo-rolling-out-to-mediacom-customers-nasdaq-tivo-1025432>; Atlantic Broadband Selects TiVo to Deliver Nation's Most Advanced Multi-Screen Viewing Experience, June 12, 2013, at <http://pr.tivo.com/press-releases/atlantic-broadband-selects-tivo-to-deliver-nation--nasdaq-tivo-1025845>.

security solutions *so long as they actually enable retail competition*. Indeed, a successor solution that is bidirectional and that applies to all MVPDs is needed to truly create a level-playing field among all MVPDs and among MVPD-provided and retail navigation devices. The point here is merely that CableCARD is a realized solution and it must be supported until a new solution that can actually enable retail competition is available. In the Third R&O, even though it had just begun considering the feasibility of an AllVid gateway as a successor technology for CableCARD, the Commission noted that “CableCARD is a realized technology — consumer electronics manufacturers can build to and are building to the standard today.”<sup>55</sup> There, the Commission went on to enact a number of regulations designed to strengthen the CableCARD rules, improve the consumer experience and strengthen retail competition. Here, following the D.C. Circuit’s decision in *Echostar*, the Commission should act to remove uncertainty regarding the CableCARD standard even as it continues to explore successor solutions consistent with the goals of Section 629.

### **CONCLUSION**

In the *Third Report and Order*, the Commission expressed its view that “[w]hile we are optimistic about the prospects of a successor technology, we must also be pragmatic about harnessing realized solutions. Therefore, until a successor technology is actually available, the Commission must strive to make the existing CableCARD standard work effectively.”<sup>56</sup> Based on Section 629 and the FCC’s regulations as promulgated in the First Report & Order, the 1999 Order on Reconsideration, and the Third Report & Order, TiVo has invested tens of millions of dollars into making retail

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<sup>55</sup> Third R&O, ¶ 8.

<sup>56</sup> Third R&O, ¶ 70.

CableCARD devices work and selling hundreds of thousands of such products to consumers across the country — consumers that are happy to have a retail alternative to operator-supplied boxes as envisioned by Section 629 of the Communications Act. Commercial investment requires a settled and predictable regulatory environment. The Commission's regulations cannot assure commercial availability of retail devices if consumers cannot rely on the products being supported or working as advertised. The Media Bureau has recognized that the *EchoStar* decision has created the potential for a fractured cable set-top box market which would harm retail competition. To make the CableCARD standard work requires reinstatement by the Commission of the recently vacated rules. No interests will be harmed by restoring the status quo, with respect to cable-delivered content, before the *EchoStar* decision. Accordingly, TiVo petitions the Commission to propose by rulemaking that the Second Report & Order and its regulations be reinstated, with the one revision as set forth in Appendix A.

Respectfully submitted,

/s/  
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## APPENDIX A

§ 76.1901 Applicability.

(a) Each ~~multi-channel video programming distributor~~ **cable system operator** shall comply with the requirements of this subpart.

(b) This subpart shall not apply to distribution of any content over the Internet, nor to a ~~multichannel video programming distributor's~~ **cable system operator's** operations via cable modem or DSL.

(c) ~~With respect to cable system operators, this~~ **This** subpart shall apply only to cable services. This subpart shall not apply to cable modem services, whether or not provided by a cable system operator or affiliate.